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Spider Labs, Ltd.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE RULE 45 SUBPOENAS ISSUED TO
GOOGLE LLC AND LINKEDIN
CORPORATION DATED JULY 23, 2020

SPIDER LABS, LTD.

Plaintiff,

v.

JOHN DOE,

Defendant.

Case No. 5:20-mc-80141-VKD

Judge: Hon Virginia K DeMarchi

**PLAINTIFF SPIDER LABS, LTD.'S
RESPONSE IN OPPOSITION TO JOHN
DOE'S MOTION TO QUASH SUBPOENAS
ISSUED TO GOOGLE LLC AND
LINKEDIN CORPORATION AND
MEMORANDUM IN SUPPORT THEREOF**

[Filed concurrently with Declarations of Eurico
Dorado and Chad T. Nitta]

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE TO BE DECIDED.....	1
I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL BACKGROUND.....	3
A. Spider Labs	3
B. The “Jeff Katzenberg” Emails	4
C. Doe’s Admissions Confirm Numerous Inaccuracies	5
D. Doe Severely Mischaracterizes the Facts Related to MRC	7
III. ARGUMENT	8
A. Doe Fails To Show That He Is Entitled To First Amendment Protections	8
B. Even If Doe’s Communications Are Protected By The First Amendment, Spider Labs Is Not Required To Meet The Summary Judgment Standard.....	10
C. Applying The Proper Standard, The Motion To Quash Should Be Denied	12
1. Spider Labs Can Establish Each Of The Elements For Defamation	12
a. The elements for a claim of defamation are present	12
b. None of Doe’s affirmative defenses save the Motion.....	14
(1) Doe’s emails were not opinion statements for purposes of a defamation analysis	15
(2) Additional discovery is necessary for the Court to ascertain the truth or falsity of Doe’s statements.....	17
(3) Spider Labs is not a public figure, and evidence exists to support a finding of actual malice	18
(4) Doe’s Statements are not matters of public concern, but there is evidence supporting gross irresponsibility	21
2. Sufficient Evidence Exists to Support Claims of Tortious Interference with Contractual Relationships and Prospective Business Advantage	21
3. Spider Labs Has a Viable Claim for Injunctive Relief	23
4. The Balance of the Hardships Strongly Favor Spider Labs.....	24
D. Doe Should Not Be Awarded His Attorney Fees	25
IV. CONCLUSION.....	25

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>In re Anonymous Online</i> , 661 F.3d at 1173	<i>passim</i>
<i>Art of Living Foundation v. Does 1-10</i> , Case No.: 10-CV-05022-LHK (N.D. Cal. Nov. 9, 2011)	14, 15
<i>Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC</i> , 151 F. Supp. 3d 287 (E.D.N.Y. 2015)	16
<i>Biro v. Conde Nast</i> , 963 F.Supp.2d 255 (S.D.N.Y. 2013).....	18, 19, 20
<i>Blair v. Inside Ed. Prods.</i> , 7 F.Supp.3d 348 (S.D.N.Y. 2014)	21
<i>Bloom v. Fox News of Los Angeles</i> , 528 F.Supp.2d 69 (E.D.N.Y. 2007)	21
<i>Calvin Klein Trademark Trust v. Wachner</i> , 129 F.Supp.2d 248 (S.D.N.Y. 2001).....	18
<i>Columbia Ins. Co. v. seescandy.com</i> , 185 F.R.D. 573 (N.D. Cal. 1999).....	11
<i>Doe v. 2TheMart.com Inc.</i> , 140 F.Supp.2d 1088 (W.D. Wash. 2001).....	9
<i>Doe v. Cahill</i> , 884 A.2d 451 (Del. 2005)	3, 11, 12
<i>Egiazaryan v. Zalmayev</i> , 880 F.Supp.2d 494 (S.D.N.Y. 2012).....	16
<i>Enigma Software Grp. USA v. Bleeping Computer LLC</i> , 194 F.Supp.3d 263 (S.D.N.Y. 2016).....	18, 19, 20
<i>General Mills, Inc. v. Chobani, LLC</i> , 158 F.Supp.3d 106 (N.D.N.Y. 2016).....	23
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	18
<i>Grayson v. Ressler & Ressler</i> , 271 F.Supp.3d 501 (S.D.N.Y. 2017).....	15
<i>Gristede's Foods v. Poospatuck (Unkechaug) Nation</i> , No. 06-cv-1260, 2009 WL 4547792 (Dec. 1, 2009).....	14

1	<i>Highfields Capital Management, L.P. v. Doe,</i>	
2	385 F.Supp.2d 969 (N.D. Cal. 2005)	9, 11, 12
3	<i>Lerman v. Flynt Distrib. Co.,</i>	
4	745 F.2d 123 (2d Cir. 1984).....	18, 19
5	<i>McIntyre v. Ohio Elections Com’n,</i>	
6	514 U.S. 334 (1995).....	9
7	<i>O.E.M. Glass Network, Inc. v. Mygrant Glass Co.,</i>	
8	436 F.Supp.3d 576 (E.D.N.Y. 2020)	22
9	<i>Puebla Palomo v. DeMaio,</i>	
10	403 F.Supp.3d 42 (N.D.N.Y. 2019).....	22
11	<i>Sabratek Corp. v. Keyser,</i>	
12	at *6.....	16
13	<i>Salinger v. Colting,</i>	
14	607 F.3d 68 (2d Cir. 2010).....	23
15	<i>Small Bus. Bodyguard Inc. v. House of Moxie, Inc.,</i>	
16	230 F.Supp.3d 290 (S.D.N.Y. 2017).....	16
17	<i>Thai v. Cayre Group, Ltd.,</i>	
18	726 F.Supp.2d 323 (S.D.N.Y. 2010).....	12, 14
19	<i>USA Technologies, Inc. v. Doe,</i>	
20	713 F.Supp.2d 901 (N.D. Cal. 2010)	9, 12
21	Statutes	
22	Cal. Code Civ. Proc. § 1987.2(c)	25
23	Court Rules	
24	F.R.C.P. § 8.....	14
25	C.P.L.R. § 3016.....	14

STATEMENT OF THE ISSUE TO BE DECIDED

Whether the Court should deny the Motion to Quash Subpoenas—Subpoenas that seek limited information regarding the Movant’s identity that would thereafter allow both Parties to proceed to a resolution of Spider Labs’s claims on the merits.

I. INTRODUCTION.

From the very first sentence of his Memorandum of Points and Authorities in Support of Motion of John Doe Movant to Quash Subpoenas to Google LLC and LinkedIn Corporation (the “MPA”), John Doe repeatedly relies on carefully curated—but conveniently unverifiable—statements of fact to support his Motion to Quash. Thus, John Doe self-servingly characterizes himself as a “computer scientist, fraud investigator, and part-time amateur blogger who has dedicated the past decade to combatting advertising fraud (“Ad Fraud”) on the Internet.” (MPA 1:2-3.) In so doing, John Doe attempts to grab the intellectual and moral high ground, holding himself out as a classic muckraker crusading for truth against evil Internet corporations. Even more critical to his strategy, John Doe offers this description of himself to bolster his calculated attempt to cloak himself in the hard-fought protections afforded by the First Amendment as a result of the tireless efforts of journalists, political activists, and advocates for change. This Court must ignore Doe’s self-serving rhetoric for a host of reasons, including the simple, undisputed truth that, unlike the First Amendment crusaders to whom he self-servingly compares himself, Doe has *never* published a single word.

Plaintiff Spider Labs’s claims in the underlying litigation are not about opinions published by Doe on an Internet forum or message board that were intended to provoke debate or raise the level of public discourse. Rather, the conduct of Doe at issue is his decision to send personal, unsolicited emails to thirteen of Spider Labs’s customers and to claim that he had written an article—which he now admits did *not* exist at the time he sent his emails—stating, among other things, that Spider Labs was “defrauding their clients” and that Spider Labs’s “clients aren’t actually protected from fraud.” (See Exs. A–E to Declaration of Eurico José Teodoro Doirado (“Doirado”).) This case is not about the First Amendment. It is about a calculated attempt by a

competitor to attack another competitor under a cloak of anonymity and to exploit important protections afforded by the First Amendment.

Importantly, denying the Motion to Quash and allowing Spider Labs to take discovery to determine the identity of John Doe will *not* prevent Doe from raising his First Amendment defenses. To the contrary, allowing Spider Labs to identify Doe will only ensure that Spider Labs receives an opportunity to take discovery and to challenge substantively the factual allegations Doe has put squarely at issue. Doe’s admissions confirm that, at a minimum, numerous questions of fact exist that Spider Labs must be allowed to explore. For example, despite claiming that he has “dedicated the past decade to combatting advertising fraud” and that he is a “fraud investigator” and “part-time amateur blogger,” Doe fails in the MPA to identify a *single word* that he has published on the Internet or any action he has taken in the last decade to combat advertising fraud. (MPA 1:2-3.) Spider Labs must be afforded the opportunity to verify Doe’s alleged history. With respect to Doe’s alleged endeavor to “create” a “blog” concerning Ad Fraud, Doe concedes that he secured the domain name www.FightClickFraud.com on February 25, 2020 (Doe Decl. ¶ 7). Yet, despite his self-proclaimed decade of experience combatting Ad Fraud, Doe cannot deny that he has never published a single thing on the website. Accordingly, Spider Labs is entitled to explore the full extent of Doe’s proclaimed blogging “efforts.”

Further, Spider Labs is entitled to ascertain whether Doe solely targeted Spider Labs—a company that he allegedly only learned existed on June 10, 2020—or whether he also “investigated” Spider Labs’s competitors. Spider Labs is also entitled to verify Doe’s factual assertions since Doe’s carefully curated recitation of events is riddled with inconsistencies and omissions. Finally, Doe admits he chose to use a pseudonym because he believed that if his identity was known, it would hurt his “credibility and neutrality” and he did not want his opinions to be “imputed to [his] employer.” (*Id.* ¶ 9.) The import of these admissions is inescapable—Doe and his employer are known in the Ad Fraud space, presumably because they offer services aimed at combatting Ad Fraud. Put another way, Doe has put squarely at issue whether he is employed by one of Spider Labs’s competitors. Spider Labs is entitled to discovery to confirm

1 that implication, particularly since being a competitor would dramatically alter the applicability
 2 of Doe’s free speech defense. At a minimum, this Court should conduct an *in camera* hearing to
 3 determine whether Doe is employed by a competitor of Spider Labs.¹ Such a determination is
 4 essential to evaluating the validity of Doe’s allegations.

5 Finally, in his haste to paint himself as a First Amendment crusader, Doe ignores the vast
 6 amount of law that grapples with the interplay between First Amendment considerations, claims
 7 for defamation, and anonymity on the Internet. Rather than offer this Court any persuasive
 8 rationale to adopt a legal standard to evaluate Doe’s requested relief, Doe instead, unsurprisingly,
 9 adopts the most stringent standard enunciated by any court. Doe’s reliance on *In re Anonymous*
 10 *Online*, 661 F.3d 1168 (9th Cir. 2011)—an appeal concerning a decision by the District Court of
 11 Nevada applying the “summary judgment” standard announced by the Delaware Supreme Court
 12 in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)—is misplaced. As the Ninth Circuit itself recognized
 13 in *In re Anonymous Online*, this Court has repeatedly applied lesser evidentiary standards than
 14 the *Cahill* standard, principally because it is patently unfair to require a plaintiff to establish that
 15 it would prevail on summary judgment on its claims *before it is even allowed to take any*
 16 *discovery*. 661 F.3d at 1176-77. Applying the appropriate legal standard—a *prima facie* or good
 17 faith standard—it is undeniable Spider Labs has met its burden. In a decision ignored by Doe in
 18 the MPA, the United States District Court for the Southern District of New York has *already*
 19 *ruled* that Spider Labs established the *prima facie* elements of its claims. (Order Granting Mot.
 20 to Expedite Disc. 2, ECF No. 5 (“New York Order”).) Doe fails to offer this Court any reason it
 21 should not defer to the district court in which the underlying action is pending. Thus, under the
 22 appropriate standard, the Motion to Quash must be denied.

23 **II. FACTUAL AND PROCEDURAL BACKGROUND.**

24 **A. Spider Labs.**

25 Spider Labs is a small company based in Tokyo, Japan, with a research development

26
 27 ¹ Whether or not Doe’s employer was aware of, or sanctioned, Doe’s conduct is irrelevant to a determination of the
 28 Motion to Quash. The fact that Doe works for a competitor is a critical fact to determining whether Doe’s statements
 constitute commercial speech. *See, e.g., In re Anonymous Online*, 661 F.3d at 1173.

center in Lisbon, Portugal. (Doirado Decl. ¶¶ 3-4, 6.) Founded in 2011 by Satoko Ohtsuki, a recent college graduate, Spider Labs has thirty-two employees. (*Id.* ¶¶ 5-6.) Despite its small size, Spider Labs is a leading provider of anti-Ad Fraud services with customers in Japan, Korea, and the United States. (*Id.* ¶ 10.) In February 2020, Spider Labs became the first vendor from the Asia-Pacific region to receive the “certified against fraud” seal from the Trustworthy Accountability Group (“TAG”). (*Id.* ¶ 11.) Spider Labs’s primary service, SpiderAF, is an anti-Ad Fraud software platform that offers users a variety of different services and functions, including a reporting dashboard, a shared “blacklist” service, and a real-time Ad Fraud detection application program interface. (*Id.* ¶ 12.) Importantly, the functionality each customer receives depends upon the services they sign up for. (*Id.* ¶ 13.) Not all of Spider Labs’s customers use SpiderAF in the same manner. (*Id.*) Accordingly, the behavior of a SpiderAF user’s website with respect to Ad Fraud will vary depending on the services the customer is receiving from Spider Labs, as well as the customer’s system implementation. (*Id.*) In November 2019, as the notoriety of SpiderAF grew, Spider Labs made the decision to change its name from Phylbit to Spider Labs. (*Id.* ¶ 14.) Spider Labs completed its efforts related to its name change in June 2020 at the same time it moved its corporate headquarters in Tokyo, Japan. (*Id.* ¶ 15.)

B. The “Jeff Katzenberg” Emails.

On June 15, 2020, Spider Labs received a direct message on Facebook from its customer, MOLOCO, Inc., a leading mobile AdTech company, informing them that they had received an email from Jeff Katzenberg and the email address jeff.k@fightclickfraud.com. (*Id.* ¶ 16; Ex. A to Doirado Decl.) Prior to receiving the email, Spider Labs had never had any dealings with an individual named “Jeff Katzenberg.” (Doirado Decl. ¶ 17.) In light of the severity of the accusations in Katzenberg’s email, including that Spider Labs’s technology was not based on artificial intelligence, that Spider Labs was defrauding its clients, that Spider Labs’s clients are not protected from Ad Fraud, and that Spider Labs’s platform could not detect Ad Fraud, Spider Labs launched an investigation. (*Id.* ¶ 18.) As part of this investigation, Spider Labs reviewed its website and identified an Internet Protocol (“IP”) address associated with an individual who

1 had viewed information related to MOLOCO shortly before MOLOCO received the email from
 2 Katzenberg. (*Id.* ¶ 19.) After identifying the IP address, Spider Labs checked its website records
 3 to see if the person associated with that IP address had reviewed any other client use cases or
 4 customer information around the same time that the MOLOCO information was reviewed. (*Id.* ¶
 5 20.) Spider Labs also identified an IP address that accessed its website via the LinkedIn app on
 6 June 15, 2020. (*Id.* ¶ 22.)

7 Spider Labs identified a number of its customers that had been viewed at the same time
 8 as MOLOCO, including ValueCommerce Co., Ltd. (“ValueCommerce”) one of Japan’s leading
 9 providers of e-commerce and Internet marketing solutions; United, Inc., a Japanese company that
 10 provides an advertising monetization platform known as “AdStir”; UNICORN, a fully automated
 11 marketing platform offered by Bulbit, Inc., a subsidiary of Adways, Inc. (“UNICORN”); and i-
 12 mobile Co., Ltd. (“i-mobile”), one of the largest advertising platform providers in Japan. (*Id.* ¶
 13 21.) Spider Labs subsequently contacted some of those customers, including ValueCommerce,
 14 United, UNICORN, and i-mobile, to determine whether they had received emails from
 15 Katzenberg. (*Id.* ¶ 23.) ValueCommerce, United, UNICORN, and i-mobile each confirmed that
 16 they had received an email on June 15, 2020 from Jeff Katzenberg and the email address
 17 jeff.k@fightclickfraud.com. (*Id.* ¶ 24; *see* Exs. B–F to Doirado Decl.) In the Subpoenas Doe is
 18 seeking to quash, Spider Labs is seeking to identify the person who registered the email address
 19 jeff.k@fightclickfraud.com and the person who was assigned the static IP address that visited
 20 Spider Labs’s website through the LinkedIn app on June 15, 2020.

21 C. Doe’s Admissions Confirm Numerous Inaccuracies.

22 In his Declaration, Doe carefully muddles the timeline of events in order to give the false
 23 impression that he conducted an orderly investigation. In particular, Doe claims to have first
 24 learned about Spider Labs through a June 10, 2020 press release (Doe Decl. ¶¶ 12, 15), completed
 25 a subsequent investigation (*Id.* ¶¶ 16-17), identified Spider Labs’s clients by visiting its website
 26 for the purpose of testing Spider Labs’s claims regarding its technology (*Id.* ¶¶ 22-26), conducted
 27
 28

1 at least “twelve hours” of testing and research (*Id.* ¶¶ 27-30), and then contacted the customers
 2 *after* completing his testing (*Id.* ¶¶ 31-32.)

3 Based on Spider Labs’s initial investigation, the timeline painted by Doe in his Declaration
 4 is not accurate. Using the IP address it had identified, Spider Labs determined that “Jeff
 5 Katzenberg” (hereinafter “John Doe” or “Doe”) had reviewed use cases for at least a half dozen
 6 of Spider Labs’s customers on the evening² of June 14, 2020. (Doirado Decl. ¶¶ 16, 19-21.) After
 7 Spider Labs obtained copies of Doe’s emails from its customers, it was able to correlate the time
 8 stamps on those emails with the time the use cases were reviewed on its website. (*Id.* ¶ 25.) In
 9 each instance, the emails were sent to the customer mere *minutes* after Doe reviewed the customer
 10 information on Spider Labs’s website. (*Id.*) Any claim by Doe to have completed a thorough
 11 investigation of Spider Labs’s technology as implemented by Spider Labs’s clients prior to
 12 contacting them is false. No time lapsed between Doe identifying the customers and his sending
 13 them emails.

14 Doe’s untrue statements continued in the emails themselves. In the emails, Doe claimed
 15 to be “currently running an article about a fraudulent company called Phylbit/SpiderAF” and then
 16 purported to summarize the contents of the article. (*See, e.g.*, Ex. B to Doirado Decl.) Yet Doe’s
 17 Declaration confirms that he was not running the article at the time he contacted Spider Labs’s
 18 customers for the simple reason that he had not even *begun* to write the article. (Doe Decl. ¶ 39.)
 19 Doe also claims to have “hired a team of engineers” to test Spider Labs’s platform and then
 20 proceeded to summarize the findings from that “team of engineers.” (*See, e.g.*, Ex. B to Doirado
 21 Decl.) Again, in his Declaration, Doe now claims to have done the analysis himself—at some
 22 unspecified time. (Doe Decl. ¶ 25-30.)

23 In his Declaration, in an effort to bolster his First Amendment argument and his self-
 24 characterization as a “crusader,” Doe goes to great lengths to claim that the launch of his website
 25 and blog was imminent. In particular, he claims that on July 23, 2020, he was contacted by his
 26

27 ² Spider Labs reasonably believes that Doe was in New York in June 2020 when the emails were sent to its customers.
 28 Accordingly, for purposes of discussing the timeline of events, Spider Labs uses New York time.

1 website developer informing him that the website was complete and that he proceeded to take
 2 steps to launch his website. (Doe Decl. ¶ 43.) Doe then claims that in the course of continuing
 3 to take steps to launch his website, he first learned of the lawsuit. (*Id.* ¶ 45.) Doe’s recitation of
 4 events is contradicted by his own emails. Specifically, on July 21, 2020—two days *before* Doe
 5 alleges that he learned of the underlying lawsuit—he contacted Spider Labs’s counsel to discuss
 6 the lawsuit. (*See* Declaration of Chad Nitta (“Nitta”) ¶ 4.)

7 Doe’s secret emails to Spider Labs’s customers attacking Spider Labs and its technology,
 8 when combined with the fact that Spider Labs was unable to identify any blog on the Internet
 9 authored by Doe, led Spider Labs to believe that Doe was working with a Spider Labs competitor.
 10 Accordingly, Spider Labs filed the lawsuit in the Southern District of New York on July 16, 2020
 11 and sought expedited discovery to determine the identity of Doe.

12 **D. Doe Severely Mischaracterizes the Facts Related to MRC.**

13 On June 15, 2020, Spider Labs received an email from an executive at the Media Rating
 14 Council (“MRC”)³ in which MRC questioned Spider Labs’s March 25, 2020 press release in
 15 which Spider Labs stated that it had “earned accreditation” by MRC. (Doirado Decl. ¶ 27.) Spider
 16 Labs reviewed the press release and confirmed that, as a result of a translation error, the
 17 “accreditation” reference only existed in the English version of the press release. (*Id.* ¶¶ 29-30.)
 18 The original version of the press release, published in Japanese, correctly stated that Spider Labs
 19 was “compliant” with MRC guidelines. (*Id.*) Upon discovering the error, Spider Labs issued a
 20 correction in English, explaining the translation mistake. (*Id.* ¶ 31.)

21 Spider Labs later learned that Doe had also sent an email to MRC on June 14, 2020 at
 22 roughly the same time that he sent the emails to Spider Labs’s customers. (*Id.* ¶¶ 32-33.) In the
 23 email, Doe claimed that he was working on his “10 first blog posts” and that one of those related
 24 to “false prophets”—companies that falsely claimed accreditation from entities like MRC. (Ex.
 25 F to Doirado Decl.) Tellingly, Doe omitted this contact with MRC from his lengthy Declaration.

26
 27 ³ MRC had originally emailed Spider Labs on June 10, 2020 but Spider Labs did not receive that email as it was in
 28 the process of moving offices.

(*See generally*, Doe Decl.) Although he may have had multiple reasons for omitting this reference, one obvious reason stands out. In the June 14, 2020 email to MRC, Doe claimed to have contacted “several” of Spider Labs’s clients—including ValueCommerce—and *to have received responses*. (Ex. F to Doirado Decl.) Specifically, Doe claimed that every Spider Labs customer he had contacted told him that “one of the main reasons for them in acquiring Phylbit services was their claim that they are MRC accredited. (*Id.*) In stark contrast to Doe’s false claims to MRC, he did not even *send* his email to ValueCommerce until *after* he sent his email to MRC. (Exs. B and F to Doirado Decl.) Accordingly, Doe intentionally misrepresented to MRC his actions in an effort to augment the perceived importance of the translation error in the English version of Spider Labs’s press release.

III. ARGUMENT.

A. Doe Fails To Show That He Is Entitled To First Amendment Protections.

In his Motion and the MPA, Doe boldly declares that the thirteen emails that he sent to Spider Labs’s customers are “anonymous free speech” entitled to First Amendment protection. (*See* MPA 5:21-22.) In support of his argument, Doe repeatedly offers parenthetical citations to cases holding that online speech is subject to First Amendment protections. (*Id.* 5:22-6:13.) Doe’s emphasis that online speech should be treated the same as other types of speech is a red herring. The fact that Doe used an online means to deliver his communications is not determinative of whether his emails constitute protected free speech.

The speech at issue is not a published article, blog, or online post. Rather, the speech in question are thirteen private communications sent by Doe to Spider Labs’s customers—and *only* to Spider Labs’s customers. Doe never released the contents of those emails publicly nor shared them beyond their intended recipients. In fact, the only reason that Spider Labs learned of their existence is because they were contacted by the customers that Doe solicited. Doe does not cite to any law that supports a finding that private communications—unlike public online posts or commentary—are subject to First Amendment protections. Doe’s presumption that his emails constitute protected free speech particularly baseless given that the emails did not facilitate “rich,

1 diverse, and far ranging exchange of ideas” or “open communication and robust debate.” *Doe v.*
 2 *2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1092 (W.D. Wash. 2001).

3 Although he offers no law or analysis, Doe apparently believes that the fact that the emails
 4 were allegedly sent in furtherance of his efforts to write an online blog renders his emails
 5 protected speech. Even if Doe *had* cited law for such a proposition, Doe’s alleged *intention* to
 6 publish a blog or online article—a question of fact that Spider Labs should be allowed to test
 7 through discovery—is irrelevant because it is undisputed that Doe did not follow through on his
 8 intention. (Doe Decl. ¶ 46.) In fact, it is undisputed that Doe, a self-described “part-time amateur
 9 blogger,” has failed to identify a single word that he has published anywhere. (See Doe Decl. ¶¶
 10 11, 41, and 46.) The cases relied upon by Doe in the MPA do not support extending First
 11 Amendment protections to non-public correspondence. See *e.g. Highfields Capital Management,*
 12 *L.P. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005) (addressing anonymous statements posted on
 13 online forums); *McIntyre v. Ohio Elections Com’n*, 514 U.S. 334 (1995) (addressing the public
 14 distribution of leaflets); *In re Anonymous Online*, 661 F.3d at 1172 (addressing online blog posts);
 15 *USA Technologies, Inc. v. Doe*, 713 F.Supp.2d 901 (N.D. Cal. 2010) (addressing messages posted
 16 to an online forum).

17 Even assuming *arguendo* that Doe’s private, non-published emails were the type of speech
 18 subject to First Amendment protection, Doe fails to support adequately his demand for
 19 anonymity. To be clear, the sole issue presented in the Motion to Quash is whether the First
 20 Amendment is sufficient grounds to protect his *anonymity*, not whether freedom of speech
 21 protects him from liability for his defamatory statements. According to Doe, anonymity allowed
 22 him to “protect his privacy, safety, and professional reputation from intimidation or
 23 harassment...” (MPA 6:17-18.) However, such protections would only matter if *Doe actually*
 24 *published something*. He does not offer this Court any reason to believe that anonymity was
 25 essential to protect his “privacy” or to promote his “safety” from “intimidation” or “harassment”
 26 by the recipients of his emails—the only people he intended to see his correspondence. In
 27 particular, Doe does not claim he expected the recipients to retaliate against him or that he
 28

1 expected them to provide copies of the emails to Spider Labs, or even that he is concerned about
 2 that if his identity is revealed in this litigation. At most, Doe can argue that he required anonymity
 3 to promote his objectivity—although Doe makes this argument solely in the context of his
 4 hypothetical blog. (*Id.* 6:21-23.) The benefit to Doe of artificially enhancing his credibility by
 5 hiding his identity and the identity of his employer does not implicate First Amendment
 6 considerations when the only people Doe contacted were Spider Labs’s customers.

7 Absent any law beyond parentheticals that merely recite the importance of free speech in
 8 American jurisprudence, Doe has failed to offer this Court any reason to conclude that his private
 9 emails to Spider Labs’s customers are subject to First Amendment protections. Given that Doe’s
 10 sole basis for seeking to quash the subpoenas is his alleged right under the First Amendment to
 11 maintain his anonymity, the Motion should be denied as a matter of law.

12 **B. Even If Doe’s Communications Are Protected By The First Amendment,**
 13 **Spider Labs Is Not Required To Meet The Summary Judgment Standard.**

14 In *In re Anonymous Online*—cited by Doe throughout the MPA—the Ninth Circuit
 15 considered a writ of mandamus challenging an order by the Nevada District Court requiring the
 16 disclosure of the identities of three anonymous online posters. 661 F.3d at 1171. In denying the
 17 writ of mandamus—and thereby upholding the requirement that the anonymous online speakers
 18 be identified—the Ninth Circuit made several important rulings that Doe entirely ignores.

19 First, the Ninth Circuit specifically noted that the “right to speak, whether anonymously
 20 or otherwise, is not unlimited...and the degree of scrutiny varies depending on the circumstances
 21 and the type of speech at issue.” *In re Anonymous Online*, 661 F.3d at 1173. Further, the Ninth
 22 Circuit recognized that commercial speech, unlike political speech, enjoys only a “limited
 23 measure of protection, commensurate with its subordinate position on the scale of First
 24 Amendment values,” and such protection only applies as long as the “communications is neither
 25 misleading nor related to unlawful activity.” *Id.* Thus, under the Ninth Circuit’s holding, the
 26 circumstances surrounding Doe’s conduct, as well as whether the communications were
 27 commercial in nature, are relevant to any First Amendment analysis.

1 In this instance, it is undisputed that the only speech at issue are private communications
 2 sent specifically to Spider Labs’s customers. It is further undisputed that, regardless of Doe’s
 3 alleged intentions, the communications were never published publicly or used in connection with
 4 something that was. Finally, Doe effectively admits that he individually and his employer are
 5 active in the Ad Fraud space—the same industry in which Spider Labs competes. Under these
 6 circumstances, there is at least a question of fact—and one that cannot be resolved without
 7 appropriate discovery—regarding whether Doe’s communications should properly be viewed as
 8 commercial speech. For all of these reasons, the Motion to Quash should be denied and Spider
 9 Labs’s case should be allowed to proceed so that it can take discovery related to Doe’s identity.
 10 Such discovery will not rob Doe of his opportunity to raise his First Amendment defense. It will
 11 only ensure that his defense is considered on its merits and in light of all relevant facts.

12 Second, the Ninth Circuit surveyed decisions from across the country and determined that
 13 a range of legal standards existed for evaluating whether disclosure of an anonymous speaker’s
 14 identity was appropriate. *Id.* at 1175-76. These standards varied from a “motion to dismiss”
 15 standard requiring a showing of good faith on the part of the party seeking discovery (relying on,
 16 among others, this Court’s decision in *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573 (N.D.
 17 Cal. 1999)) to a “*prima facie*” standard requiring a *prima facie* showing of the claim for which
 18 the party seeks the disclosure (relying on, among others, this Court’s decision in *Highfields*
 19 *Capital Mgmt., LP v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005)) to the highest standard—the
 20 “summary judgment” or *Cahill* standard—requiring that the party seeking the discovery
 21 demonstrate it could obtain summary judgment on its claim. *Id.*

22 Despite the Ninth Circuit’s clear separation of the various standards, Doe attempts to
 23 conflate the *prima facie* and *Cahill* “summary judgment” standards. (MPA 7:18-22.) The Ninth
 24 Circuit expressly noted that the *Cahill* “summary judgment” standard is *different* than the “*prima*
 25 *facie*” standard adopted by this Court in *Highfields*.⁴ *In re Anonymous Online*, 661 F.3d at 1175.

26
 27 ⁴ Notably, Magistrate Judge Brazil in the *Highfields* decision relied on this Court’s decision in *Columbia*, which the
 28 Ninth Circuit noted in *In re Anonymous Online* only required a “good faith” showing, not a *prima facie* showing.

1 Worse, Doe blatantly mischaracterizes the decision in that case: in direct contradiction to Doe’s
 2 claim, the Ninth Circuit did *not* adopt the *Cahill* standard. (MPA 7:18-22.) Rather, it held that
 3 the Nevada District Court should not have applied the *Cahill* standard because the speech at issue
 4 was not political. *In re Anonymous Online*, 661 F.3d at 1177.

5 In *USA Technologies*, this Court expanded on its decision in *Highfields* and held that in
 6 the context of a motion to quash a subpoena aimed at identifying an anonymous speaker, it is the
 7 burden of the party seeking the discovery to “adduce, without the aid of discovery, *competent*
 8 *evidence* addressing all of the inferences of fact essential to support a *prima facie* case on all
 9 elements of a claim.” 713 F.Supp.2d at 907 (emphasis in original). After that showing is made,
 10 the reviewing court must balance the competing interests of the parties. *Id.*

11 **C. Applying The Proper Standard, The Motion To Quash Should Be Denied.**

12 Applying the proper standard for evaluating Doe’s First Amendment arguments, the
 13 Motion to Quash should be denied because Spider Labs can demonstrate and cite to competent
 14 evidence supporting the *prima facie* elements of each of its claims. Not only will it demonstrate
 15 that here, but the Southern District of New York has *already* held that Spider Labs established
 16 each of the elements in its Complaint. (New York Order 2.)

17 **1. Spider Labs Can Establish Each Of The Elements For Defamation.**

18 **a. The elements for a claim of defamation are present.**

19 In order to evaluate whether Spider Labs can make a *prima facie* case for defamation, it
 20 is necessary first to determine the elements of the claim and the level of showing that is required
 21 at this stage of the proceedings (*i.e.* at the pleading stage). To succeed on a claim for defamation,
 22 a plaintiff must establish “(1) a false statement about the plaintiff; (2) published to a third party
 23 without authorization or privilege; (3) through fault amounting to at least negligence on [the] part
 24 of the publisher; (4) that either constitutes defamation per se or caused ‘special damages’.” *Thai*
 25 *v. Cayre Group, Ltd.*, 726 F.Supp.2d 323, 329 (S.D.N.Y. 2010).

26 On the face of the Complaint, Spider Labs alleged (1) Doe published one or more false
 27 and derogatory statements about Spider Labs (2) to Spider Labs’s customers (3) intentionally, or
 28

1 with negligent disregard for the statements’ falsity (4) that constituted defamation per se and
2 caused general and special damages to Spider Labs. (Compl. ¶¶ 15-17, 31-35.)

3 Moreover, Spider Labs can point to competent evidence outside the pleading supporting
4 each element. First, Spider Labs has in its possession many of the emails that Doe admits (Doe
5 Decl. ¶ 32) that he sent to Spider Labs’s customers on June 15, 2020. (*See e.g.* Exs. A–E to
6 Doirado Decl.) Those emails contain numerous false statements, including that (1) Doe was
7 running an article about Spider Labs and its product, SpiderAF, on his blog; (2) Spider Labs’s
8 technology is not based on artificial intelligence; (3) Spider Labs is defrauding its clients; (4)
9 Spider Labs’s clients are not protected from fraud; (5) he had hired a team of engineers to test
10 Spider Labs’s technology; (5) there is nothing behind Spider Labs’s platform; and (6) Spider
11 Labs’s platform cannot detect fraud. (*Id.*) Notably, Doe does *not* address the foregoing portions
12 of his emails in the Motion or the MPA, instead choosing repeatedly to characterize the emails or
13 to quote snippets focused on the press release related to MRC. Doe’s reason for doing this is
14 obvious—the emails, viewed in their entirety, are competent evidence of Spider Lab’s defamation
15 claims. Doe does not allege that Spider Labs authorized him to send the emails. Thus, Spider
16 Labs has more than sufficient competent evidence to meet the first two elements of a *prima facie*
17 case for defamation under New York law.

18
19 In terms of the third element—fault amounting to at least negligence—Doe freely admits
20 that he made no effort to contact Spider Labs prior to sending his unsolicited emails to Spider
21 Labs’s customers. (*See* Doe Decl. ¶¶ 31-32.) Further, he did not license Spider Labs’s technology
22 for evaluation purposes or discuss with any of Spider Labs’s customers the type of functionality
23 that they had licensed from Spider Labs, how it was supposed to work, or what it was supposed
24 to do. Doe claims to have done testing but does not claim to have followed any established
25 methodology to ensure the validity or accuracy of his testing methods. (Doe Decl. ¶¶ 22-26.) In
26 the *only* other “investigation” that Doe claims he conducted during 2020—related to two websites
27 that published reviews—the *first* thing Doe claims to have done is contact the websites and
28

brought the issue to their attention (Doe Decl. ¶ 11)—something that indisputably did not occur here as Doe *never* contacted Spider Labs regarding his allegations. Thus, Doe’s own admissions confirm that competent evidence exists to support a *prima facie* finding that Doe acted at least negligently when publishing the emails in question.

As for the final element, under New York law, generally “a statement that ‘tend[s] to injure the plaintiff in his or her trade, business or profession’ is defamatory per se and does not require proof of special damages to be actionable,” and “[w]here a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies and injury is conclusively presumed’.” *Thai*, 726 F.Supp.2d at 331 (citations omitted). Doe’s statements relate directly to Spider Labs’s business, its products, and its integrity. As such, the final element is present. Therefore, Spider Labs has established a *prima facie* claim for defamation.⁵

b. None of Doe’s affirmative defenses save the Motion.

In a strategic effort to overcome Spider Labs’s competent evidence, Doe boldly states that in “evaluating the viability of a plaintiff’s claims, the Court should consider any and all affirmative defenses presented by the defendant.” (MPA 14:5-7.) Put bluntly, the single case that Doe relies on for this proposition does *not* support Doe’s argument. In *Art of Living Foundation v. Does 1-10*, Case No.: 10-CV-05022-LHK (N.D. Cal. Nov. 9, 2011), this Court stated in a footnote that a reviewing court *might* consider fair use arguments raised in a motion to quash even where the applicable standard requires only a *prima facie* showing of the plaintiff’s

⁵ Spider Labs is not required, as Doe implies, to meet the heightened pleading standard required by New York statute for defamation claims. The very cases cited by Doe clearly state as such. *See, e.g., Gristede’s Foods v. Poospatuck (Unkechauge) Nation*, No. 06–cv–1260, 2009 WL 4547792 at *9 (Dec. 1, 2009) (“the federal rules do not require the particularized pleading requirements set forth in New York’s C.P.L.R. section 3016”). Rather, federal courts, even in New York, apply the pleading standard of Federal Rule of Civil Procedure 8, that “each pleading be specific enough to ‘afford defendant sufficient notice of the communications complained of to enable him to defend himself’.” *Id.* (internal citations omitted). For defamation claims in particular, the Southern District of New York requires that plaintiffs identify the allegedly defamatory communication, who made it, to whom, and when. *Thai*, 726 F.Supp.2d at 329. Doe’s argument that Spider Labs’s allegations lack the required particularity does not change the conclusion that Spider Labs has met the burden of establishing a *prima facie* claim for defamation. Spider Labs alleged in the Complaint that one or more false statements of fact about Spider Labs were communicated in emails, sent by Doe, to multiple Spider Labs customers, on June 15, 2020. Compl. ¶¶ 23, 31. Spider Labs even summarized what assertions in the emails were defamatory. Compl. ¶ 15. Thus, Spider Labs has pled with sufficient particularity.

claim because the *fair use doctrine* enshrines an important First Amendment Protection. No. 10–CV–05022, 2011 WL 5444622 at *8, n. 6 (N.D. Calif. 2011) (emphasis added). Doe does not claim that any of his affirmative defenses “enshrine an important First Amendment protection” and therefore there is no legal support for Doe’s claim that this Court need consider his affirmative defenses in determining whether Spider Labs has made a *prima facie* showing of its defamation claim. Notwithstanding the absence of any supporting law, considering Doe’s affirmative defenses does not change the determination that Spider Labs has met the burden of establishing a *prima facie* claim for defamation.

(1) Doe’s emails were not opinion statements for purposes of a defamation analysis.

Doe argues that Spider Labs’s defamation claim is not viable because the statements put forth in his emails were “pure opinion,” not statements of fact. (MPA 9:26.) Whether a statement is opinion or fact for defamation purposes depends on several factors, including (1) whether its meaning is unambiguous; (2) whether it can be proven true or false; (3) its context; and (4) its “broader social context.” *Grayson v. Ressler & Ressler*, 271 F.Supp.3d 501, 516 (S.D.N.Y. 2017) (finding three of four statements alleged by plaintiff were actionable defamation). However, when a statement makes criminal accusations or “derogation[s] of professional integrity in terms subject to factual verification, [however,] the borderline between fact and opinion has been crossed’.” *Id.* (citations omitted). Opinion implying facts unknown to the recipient is actionable defamation, but opinion citing facts upon which it relies is not. *Id.*

Various assertions Doe makes in his emails that Spider Labs maintains are false—about Spider’s use of artificial intelligence, that SpiderAF cannot detect fraud, that there is nothing behind Spider Labs’s technology—are capable of being proven true or false. Further, Doe continually implies that he is relying on facts unknown to the reader to form his opinion. (*See, e.g.,* Exs. A–B to Doirado Decl. (“In my article, I talk about ... how they claim their technology is artificial intelligence based (which it isn’t.”).) All of the foregoing strongly supports a finding that Doe’s statements were actionable defamation, not “pure opinion.” At a minimum, Spider

1 Labs is entitled to know Doe’s identity in order to test the validity of the argument that the
 2 statements were truly opinion. Among other things, Doe’s identity is critical to whether he knew
 3 of the falsity or probable falsity of the facts underlying his so-called opinions. As discovery is
 4 critical to Doe’s affirmative defense, the Motion to Quash must be denied so that both Parties can
 5 engage in substantive discovery.

6 The cases Doe relies on do not salvage his arguments. Doe points to cases finding that
 7 statements calling a plaintiff a “fraud” and a “liar” or the plaintiff’s conduct “extortion,
 8 manipulation, fraud, and deceit” were not actionable as defamation because the context and
 9 speculative nature of the statements “signal[] the reader that what is said is opinion, not fact” or
 10 could not be proven false. (MPA 10:12-18) (*citing Sabratek Corp. v. Keyser*, at *6; *Small Bus.*
 11 *Bodyguard Inc. v. House of Moxie, Inc.*, 230 F.Supp.3d 290, 312 (S.D.N.Y. 2017).) However,
 12 Doe does not offer this Court any persuasive reason to conclude that he signaled to the recipients
 13 of his emails that his statements were opinions. To the contrary, Doe in his emails cites to his
 14 own efforts and the efforts of his “team of engineers” to validate his statements that Spider Labs’s
 15 “clients aren’t actually protected from fraud,” that Spider Labs is “defrauding” its clients, and that
 16 “there’s nothing behind [Spider Labs’s] platform.” (Exs. A–E to Doirado Decl.) Thus, Doe goes
 17 out of his way to make his statements appear as *fact* not opinion.⁶

18 In contrast to an opinion column in a newspaper, Doe’s email creates an expectation in
 19 the reader that he intends the blog article to be an informative exposé on Spider Labs’s
 20 inadequacies. *Egiazaryan* draws “sharp contrast” between “editorial formats” and “news
 21 reporting.” *Egiazaryan v. Zalmayev*, 880 F.Supp.2d 494, 507 (S.D.N.Y. 2012). Similarly, though
 22 New York courts *often* protect statements made in online forums, the Eastern District of New
 23 York made clear that those “cases do not stand for the proposition that no comments posted on
 24 an online forum can ever be found to be defamatory.” *Bellavia Blatt & Crossett, P.C. v. Kel &*

25
 26 ⁶ Doe goes even further and attempts to argue that his opinions were also not actionable because they were made in
 27 good faith and supported by facts. (MPA 11:21-22.) Not only does Doe’s argument go to the merits of his defense—
 28 and is therefore not relevant at this stage—it emphasizes the importance of discovery to Doe’s defenses. Given that
 Doe’s defenses are fact-heavy, they actually support a denial of the Motion to Quash so that discovery can occur.

1 *Partners LLC*, 151 F. Supp. 3d 287 (E.D.N.Y. 2015). Thus, even in the context of the internet,
 2 “an email sent by a blogger requesting an interview” could just as easily signal to the recipient
 3 that the sender was a reporter writing a fact-based news article as they could signal that he was
 4 an opinion writer, particularly when that “blogger” calls his piece an “article” and describes the
 5 factual assertions made in it. (MPA 11:7-8; Exs. A-E to Doirado Decl.) Furthermore, by masking
 6 his identity—which Doe admits he did—Doe hid any indicators that he might have a conflict of
 7 interest skewing his viewpoint. (Exs. A-E to Doirado Decl.; Doe Decl. ¶ 9.)

8 **(2) Additional discovery is necessary for the Court to**
 9 **ascertain the truth or falsity of Doe’s statements.**

10 After touting that his statements were “pure opinion” and therefore could not form the
 11 basis of a claim of defamation, Doe paradoxically argues that his statements were “substantially
 12 true” and therefore not actionable. (MPA 12:1.) As an initial matter, Doe’s argument is entirely
 13 factual. Among other things, Doe touts his “independent investigation” and that he
 14 “independently conducted his own tests of Spider Labs’s technology.” (MPA 12:15-16.) Thus,
 15 Doe repeatedly interjects factual conclusions into his assertions—conclusions that Spider Labs
 16 conveniently cannot challenge because *Doe is seeking to prevent Spider Labs from taking*
 17 *discovery*. Doe cannot rely on questions of fact as a basis to support his Motion to Quash.
 18 Moreover, Doe’s “substantial truth” defense goes directly to the merits of Spider Labs’s claim,
 19 not whether Spider Labs has met the burden of establishing the *prima facie* elements of a claim
 20 for defamation. Accordingly, this Court should completely disregard the argument.

21 Notwithstanding the foregoing, if the Court is inclined to consider Doe’s “substantial
 22 truth” defense, Doe fails to adduce sufficient evidence. The adequacy of Doe’s investigative
 23 efforts is not at issue—it is the truthfulness of his statements. Not only does Spider Labs
 24 vehemently deny the truthfulness of the statements it asserts are defamatory⁷, Spider Labs has no
 25 way to test *any* of the facts upon which Doe bases his “substantial truth” defense. Furthermore,

26
 27 ⁷ Spider Labs has not alleged that the statement regarding its MRC accreditation, which Doe continuously points to,
 28 was defamatory. (Compl. ¶ 15.) Spider Labs has conceded that the English translation of its press release was
 incorrect and took steps to correct it in the public sphere before filing this lawsuit. (Doirado Decl. ¶¶ 29-31.)

holding up one statement in an email as substantially true does not cleanse the others of their defamatory nature. Finally, Doe cites no law holding that a “reasonable and good faith belief” is equivalent to substantial truth, so his argument as to his “belief” is irrelevant. (Mot. 12:20.) Under the *prima facie* standard, Doe has not provided sufficient evidence to overcome the viability of Spider Labs’s defamation claim via the defense of substantial truth.

(3) Spider Labs is not a public figure, and evidence exists to support a finding of actual malice.

Contrary to Doe’s assertion, Spider Labs is not a limited-purpose public figure. The Supreme Court has held that, in defamation actions, “otherwise private individuals [may be] considered public figures ‘for a limited range of issues.’” *Biro v. Conde Nast*, 963 F.Supp.2d 255, 270 (S.D.N.Y. 2013) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-36 (1974)). Under a four-part test adopted by the Second Circuit for determining whether this defense applies to a particular plaintiff, a defendant must establish that a plaintiff has:

(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.

Enigma Software Grp. USA v. Bleeping Computer LLC, 194 F.Supp.3d 263, 288 (S.D.N.Y. 2016) (quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984); accord *Biro*, 963 F.Supp.2d at 270. A “public controversy” is any topic of which “‘sizeable segments of society have different, strongly held views’.” *Biro*, 963 F.Supp.2d at 273 (quoting *Lerman*, 745 F.2d at 138). It must have been controversial at the time the plaintiff entered the conversation. *Id.* (citing *Calvin Klein Trademark Trust v. Wachner*, 129 F.Supp.2d 248, 252 (S.D.N.Y. 2001) (“Prior to plaintiffs’ making these statements, however, there was no ‘public controversy’ over the issues of the quality of Warnaco goods or non-Calvin-Klein goods being passed off as Calvin Klein goods.”)).

In *Enigma Software*, the Court found that the defendant had not sufficiently identified a

1 public controversy where it asserted that “[t]he public controversy at issue here is Plaintiff’s
2 deceptive business practices, the danger its software poses, and Plaintiff’s harassment of those
3 who criticize it” but failed to provide evidence that “sizeable segments of society” had strong
4 views about any one of them. 194 F.Supp.3d at 289 (quoting *Lerman*, 745 F.2d at 138). The
5 Court further found that the defendant failed to allege any facts suggesting a public position taken
6 by the plaintiff on the “integrity of its business practices or the quality of its products,” and that
7 the plaintiff’s “sales and recognition” and alleged litigiousness did not show it had injected itself
8 into a controversy, either. *Id.*

9 At the outset, this stage of the litigation is much too early for the Court to adjudicate
10 whether Spider Labs is a public figure for a limited purpose. In *Biro*, the Court noted that it is
11 permissible, but not required, for a court to determine whether a plaintiff is a public figure in
12 considering a motion to dismiss, *if* the determination can be made based on the pleadings alone.
13 963 F.Supp.2d at 270. Doe has not presented sufficient evidence for the Court to make that
14 determination at this stage. Doe continues to point to a press release issued by Spider Labs which
15 it later acknowledged contained a translation error. (Doirado Decl. ¶¶ 29-31.) Doe cannot cherry-
16 pick one assertion from an email that was riddled with claims about Spider Labs and its
17 technology, particularly when that assertion is not one that Spider Labs has alleged as defamatory.
18 Doe does not present any evidence supporting the factors of the four-part test as relate to the
19 numerous defamatory statements in his emails. (MPA 13:13-18.)

20 Even assuming *arguendo* that Spider Labs invited public attention by publishing the press
21 release at all, Doe has presented insufficient evidence to support a finding that a public
22 controversy existed at the time of publication. (*Id.*) In fact, Doe presents no evidence that a
23 public controversy about Spider Labs exists at all, other than the one drummed up by him. (MPA
24 13:15-16 (“[Spider Labs] is at the center of the controversy surrounding its false statements”).)
25 Like the defendant in *Enigma Software*, Doe has failed to identify any “sizeable segment of
26 society,” other than himself, that is concerned about the alleged problems with Spider Labs.
27 Further, Doe has failed to identify any ways in which Spider Labs has injected itself into a
28

1 controversy related to the statements alleged as defamatory by Spider Labs. At most, Spider Labs
2 issued a press release related generally to the quality of its products, but again, Doe has presented
3 no evidence that a controversy existed regarding the quality at the time. Doe's argument that
4 Spider Labs "regularly issues press releases, operates its own blog, presents at industry events,
5 and seeks attention for [its] products" is similar to the defendant's argument in *Enigma Software*
6 that the plaintiff's general success constituted injecting itself into a public controversy. (MPA
7 13:16-18.) In sum, Doe has failed to present sufficient evidence supporting a finding that Spider
8 Labs is a limited-purpose public figure.

9 Even if the Court were to accept Doe's argument at this stage that Spider Labs is a limited-
10 purpose public figure, Spider Labs has presented sufficient *prima facie* evidence of actual malice
11 on Doe's part to maintain its claim. Actual malice requires a showing of intentional or at least
12 recklessness. *Biro*, 963 F.Supp.2d at 276. Proving actual malice is a "heavy burden," and a
13 pleading must be both plausible and supported by factual allegations. *Id.* at 278-79. But Spider
14 Labs has met it. First, Spider Labs pled in its Complaint that "Doe intentionally, or with negligent
15 disregard for their falsity and without privilege or authorization, published false and defamatory
16 statements concerning Spider Labs to multiple Spider Labs' (*sic*) customers." (Compl. ¶ 32.)
17 Second, in Doe's emails, he expressly stated that his goal was "to expose them," referring to
18 Spider Labs, adding in at least one of them: "I really think you should find a different vendor!".
19 (*See, e.g.*, Ex. B to Doirado Decl.) Third, it is undisputed that the *only* company Doe identified
20 and pursued while preparing his unpublished blog and the only company whose clients he
21 contacted was Spider Labs. Finally, in its own internal investigation, Spider Labs concluded that
22 Doe contacted its customers mere minutes after reviewing the ways in which they implemented
23 Spider Labs's products on Spider's website, not after a lengthy investigation. (Doirado Decl. ¶
24 25.) The foregoing supports a *prima facie* finding that Doe *targeted* Spider Labs and, in his haste
25 to attack Spider Labs in the eyes of its customers, showed a reckless disregard for the truth or
26 falsity of his assertions.

(4) **Doe’s Statements are not matters of public concern, but there is evidence supporting gross irresponsibility.**

“[A] private-figure plaintiff is involved in a matter of public concern if the speech at issue ‘is related to a ‘matter of political, social, or other concern to the community or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public’.” *Blair v. Inside Ed. Prods.*, 7 F.Supp.3d 348, 357 (S.D.N.Y. 2014). Where a statement is found to relate to a matter of public concern, the plaintiff must show that the defendants “‘acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.’” *Bloom v. Fox News of Los Angeles*, 528 F.Supp.2d 69, 75-76 (E.D.N.Y. 2007).

Here, the specific topics Doe references in his emails—the quality of Spider Labs’s product and its professional integrity—are not matters of “general interest,” and Doe presents no evidence as such. Instead, Doe relies on the alleged importance of Ad Fraud to justify his claim that he was addressing matters of public concern. This Court need not determine whether Ad Fraud on the Internet is a subject of general interest as Doe’s statements in his emails—the only statements at issue in Spider Labs’s claim for defamation—did not address Ad Fraud.

Further, even if the Court were to agree with Doe’s argument that Doe’s emails relate to a matter of public concern, Doe has irresponsibly shared his allegations with Spider Labs’s customers without conducting a valid test of Spider’s products, citing reliable sources, giving Spider Labs an opportunity to comment, or verifying the validity of his statements. (Exs. A–F to Doirado Decl.) Therefore, there is at least a question of fact as to the manner in which Doe acted, and Doe has presented no indisputable evidence that is dispositive on this question. Accordingly, Doe has not presented sufficient evidence for a public concern defense to overcome Spider Labs’s claim for defamation.

2. **Sufficient Evidence Exists to Support Claims of Tortious Interference with Contractual Relationships and Prospective Business Advantage.**

Rather than examine the elements required to make out claims for tortious business interference, Doe characterizes Spider Labs’s claims as a mere re-hash of its defamation claim

1 and rests on his defamation arguments. (MPA 16:10.) Doe's arguments are not well taken.

2 Under New York law, to prevail on claims for both tortious interference with a contractual
3 relationship and tortious interference with a prospective business advantage, a plaintiff must show
4 "(1) a business relationship between Plaintiffs and a third party (2) that the Defendants knew of
5 and intentionally interfered with (3) solely out of malice or through the use of dishonest, unfair,
6 or improper means (4) thereby injuring Plaintiffs." *O.E.M. Glass Network, Inc. v. Mygrant Glass*
7 *Co.*, 436 F.Supp.3d 576, 594 (E.D.N.Y. 2020). "[T]he conduct must be 'directed not at the
8 plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship.'" *Puebla Palomo v. DeMaio*, 403 F.Supp.3d 42, 64 (N.D.N.Y. 2019).

9
10 Here, Spider Labs has established it had preexisting relationships with the customers
11 emailed by Doe. (Doirado Decl. ¶¶ 21, 23.) By emailing those customers, explicitly telling at
12 least one of them to "find a different vendor," and sowing doubt about Spider Labs's integrity
13 and the efficacy of its technology, Doe intentionally interfered with those relationships. (Exs. A-
14 E to Doirado Decl.) The third element is met because Doe's conduct constituted the independent
15 tort of defamation. The fourth element is met because Doe's actions have harmed Spider Lab's
16 credibility with those customers he contacted and whom Spider Labs had to contact in the process
17 of investigating Doe's actions. Finally, Doe's actions were directed at the customers, who are
18 third parties with whom plaintiff has and hopes to continue to have business relationships.
19 Therefore, Spider Labs has a viable *prima facie* claim for tortious interference with contractual
20 relationships and prospective business advantage.

21 The sole reason Doe offers this Court to lump Spider Labs's interference claims in with
22 its defamation claim is that he alleges, without support, that the interference claims are based on
23 the injury to its reputation. (MPA 16:16.) Doe conveniently ignores that he attacked the *efficacy*
24 of Spider Lab's technology, and in particular its technical performance. Further, Doe *targeted*
25 Spider Labs and its customers. On their face, Doe's actions support a finding that he was
26 attempting to convince Spider Labs's customers to cease working with Spider Labs, not because
27 of Spider Labs's reputation, but for business performance reasons. While Doe's statements
28

certainly defamed Spider Labs, that is not the limit of Spider Labs’s claims.

3. Spider Labs Has a Viable Claim for Injunctive Relief.

In federal court, plaintiffs seeking a permanent injunction must show “(1) a likelihood of irreparable harm; (2) either a likelihood of success on the merits or sufficiently serious questions as to the merits plus a balance of hardships that tips decidedly in their favor; (3) that the balance of hardships tips in their favor regardless of the likelihood of success; and (4) that an injunction is in the public interest.” *General Mills, Inc. v. Chobani, LLC*, 158 F.Supp.3d 106, 115 (N.D.N.Y. 2016). In *General Mills*, the Court held that General Mills had sufficiently demonstrated a likelihood of success on its false advertising claim and that irreparable harm was likely to occur without an injunction. *Id.* at 119-21. The Court held that Chobani, on the other hand, did not have a legitimate interest in “perpetuating false claims ... that specifically single out a competitor’s product” and that the public has an interest in “preventing false or misleading advertising.” *Id.* at 121. The Second Circuit has found the irreparable harm element is met when a harm cannot be remedied without injunctive relief or when “a loss is difficult to replace or difficult to measure.” *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010).

Spider Labs has demonstrated evidence supporting each of the elements for injunctive relief. Primarily, monetary damages will not repair the harm already caused to Spider Labs’s reputation and business relationships, and they will not prevent the same harm from occurring again. At this stage, the Court has only Doe’s word to go on that he “has ‘decided not to launch [his] Blog.’” (MPA 17:24-25.) All other evidence—the fact that Doe’s emails explicitly discuss an article he plans to publish, his purchase of the domain name www.fightclickfraud.com, and the fact that he continues to hide his identity—indicate that he plans to continue to anonymously communicate false and defamatory statements about Spider Labs. (Exs. A-E to Doirado Decl.; Doe Decl. ¶¶ 6-7, 9.) Spider Labs’s damages are also difficult to measure at this stage in the litigation. Spider Labs has also demonstrated a likelihood of success on the merits. Doe has not sufficiently demonstrated a hardship to himself that would outweigh that incurred by Spider Labs, particularly if it is in fact true that Doe, like Chobani was to General Mills, is a competitor of

Spider Labs. Finally, the public has an interest in enjoining defamation, the publication of false statements, and improper business interference. Therefore, Spider Labs has established a *prima facie* basis for seeking permanent injunctive relief against Doe.

4. **The Balance of the Hardships Strongly Favor Spider Labs.**

In his final argument for quashing the Subpoenas, Doe argues the Subpoenas “must be quashed because Doe’s interest in speaking openly and anonymously about interests of public importance outweighs whatever interest Spider Labs has in pursuing this lawsuit to punish Does for speaking out against Spider Labs.” (MPA 18:6-8.) Doe’s self-serving characterization of the hardship each Party faces underscores why the Motion to Quash must be denied.

First, the undisputed facts show that Doe did not “speak out against Spider Labs” nor did he speak “openly” or publicly. Instead, he sent private emails to Spider Labs’s customers—and *only* Spider Labs’s customers—that were filled with false attacks on Spider Labs’s integrity and the efficacy of its technology. Second, Doe’s pretext for his emails—that he is an amateur blogger who *intended* to publish a blog—does not support Doe’s position because he not only did not publish his article about Spider Labs, he never published any article about anything or anyone. Doe has never used his voice and therefore cannot claim to be silenced. Moreover, Doe does not establish any reason why the loss of his anonymity would harm him. He claims to require anonymity so that he can maintain the perception of objectivity—a self-serving but irrelevant goal given that he has not spoken publicly to anyone about anything. Doe fails to establish any harm that he will suffer if he loses his anonymity.

In contrast, through the Motion to Quash, Doe is asking this Court to deprive Spider Labs of the opportunity to have its day in court. Unlike Doe, who will still have the opportunity to defend himself if the Motion to Quash is denied, Spider Labs will not be able to proceed with this lawsuit if it cannot determine Doe’s identity. In essence, Doe is asking this Court to allow him to target Spider Labs without fear of being held accountable for his actions. While every party that has engaged in defamation would certainly want the same outcome, forcing Doe to defend his actions is not a hardship. Depriving Spider Labs of *any* recourse at this initial stage based on

Doe’s invocation of the First Amendment—notwithstanding his undisputed failure to engage in any public speech and notwithstanding his tacit admission to working in a prominent capacity in Spider Lab’s industry—would be a hardship to Spider Labs, and is the *precise* outcome the Ninth Circuit sought to avoid in upholding the district court’s decision to require disclosure of identities in *In re Anonymous Online*, 661 F.3d at 1177.

D. Doe Should Not Be Awarded His Attorney Fees.

In his request for attorney fees, Doe carefully omits from his citation to Cal. Code Civ. Proc. § 1987.2(c) the portion that states that an award is only appropriate if, among other things, “the underlying action arises from the moving party’s exercise of free speech rights on the Internet and the respondent has failed to make a prima facie showing of a cause of action.”

As set forth *infra*, it is undisputed that Doe’s “free speech rights on the Internet” are not at issue because *Doe did not publish his speech on the Internet*. He merely sent private communications to Spider Labs’s customers. Moreover, Spider Labs has demonstrated a prima facie basis for its claims, and the Southern District of New York has already ruled as such. (New York Order 2.) Therefore, on its face, Cal. Code Civ. Proc. § 1987.2(c) does not apply. Doe’s request for fees must be denied.

IV. CONCLUSION.

For the foregoing reasons, Doe’s Motion to Quash must be denied.

Dated: September 23, 2020.

KUTAK ROCK LLP

By: /s/ Chad T. Nitta

Rebecca L. Wilson (SBN 257613)

Chad T. Nitta (*appearance pro hac vice*)

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ATTORNEYS FOR PLAINTIFF
Spider Labs, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I electronically filed the foregoing **PLAINTIFF SPIDER LABS, LTD.'S RESPONSE IN OPPOSITION TO JOHN DOE'S MOTION TO QUASH SUBPOENAS ISSUED TO GOOGLE LLC AND LINKEDIN CORPORATION AND MEMORANDUM IN SUPPORT THEREOF** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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